

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2024

Public Authority: HM Treasury
Address: 1 Horse Guards Road
Westminster
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested correspondence sent by HM Treasury ("HMT") to the polling company Hanbury Strategy regarding polling questions for a specific time period. HMT refused to provide it citing 35(1)(a) (formulation/development government policy), section 43(2) (commercial interests) and section 40(2) (personal data). HMT upheld this at internal review.
2. The Commissioner's decision is that the information which HMT cited was exempt under section 43(2) is out of the scope of the request. HMT is not entitled to rely on section 35(1)(a) in respect of some of the withheld information but is entitled to rely on section 35(1)(a) for other parts of it. HMT is also entitled to rely on section 40(2) for the personal data within the withheld information.
3. The Commissioner requires HMT to take the following steps to ensure compliance with the legislation.
 - Disclose the information set out in the Confidential Annex to this Notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant had had an exchange of FOIA correspondence with HMT from 2022 regarding questions it had given to Hanbury Strategy in 2020. During the exchange, they refined and narrowed their FOIA requests on this topic. Notwithstanding any further requests they may wish to make to HMT on this subject, this exchange culminated in a request to HMT dated 28 June 2022 where the complainant requested information of the following description:

"In terms of narrowing down the scope of the requested information, what I would suggest in the first instance is to confine this request to the first of the two contracts with Hanbury Strategy that I referred to (CCZZ20A32), which I believe ran from 10/06/20 to 10/09/20. I will reserve my rights to re-submit a separate request at a later date relating to the second of the contracts (CCZZ20A50), covering focus groups and opinion polls conducted up to the end of December.

However, I hope that by confining my current request to information relating to a three-month period from 10th June to 10th September 2020, rather than the seven-month period covered by my original request, I am being as accommodating as possible to try and bring the request within the cost of compliance limits to which you referred in your response."

6. On 25 July 2022, HMT responded. It advised that it held information within the scope of the request but that it would exceed that statutory limit (set in Section 12 and by regulation) to provide a response.
7. On 9 August 2022, the complainant made a further revised request.

"To recap, my initial request sought:

1. Copies of all emails and other correspondence sent internally within the Treasury, including via text message and social messaging apps, regarding the proposed weekly directions and questions that the Treasury was providing to Hanbury Strategy to inform the focus groups and opinion polling the latter conducted from Jun-Dec 2020 under the contracts CCZZ20A32 and CCZZ20A50; and
2. Copies of all emails and other correspondence sent externally from the Treasury to Hanbury Strategy from Jun-Dec 2020, including via text message and social messaging apps, providing (a) the Treasury's directions on the question schedules to be used in Hanbury's twice-

weekly focus groups and (b) the Treasury's requested set of 20-30 questions to be asked in Hanbury's weekly web-based quantitative opinion polls.

Following your response asking me to narrow down the scope of the requested information, I offered – in the first instance, and without prejudice to subsequent requests – to narrow down my request to the period 10th June to 10th September, covering the duration of Contract CCZZ20A32. Having received your latest response asking me to narrow down the timescale of my request further to come within the statutory limit, I would like to make the following suggestion, again without prejudice to further subsequent requests I may wish to make to obtain other information not contained within the scope of this refined request. Can I request the information set out at (1) and (2) above related to the focus groups and online polls conducted in the w/c 29 June and w/c 6 July, and the w/c 27 July and w/c 3 August.

That will reduce the scope of my most recent request by two-thirds. Indeed, compared to my original request, which covered approximately 60 individual focus groups and 30 online polls – this revised request now covers just 8 focus groups and 4 online polls. I hope you will therefore accept that I have gone as far as I reasonably can to narrow the scope of my request, and that you will now be prepared to provide the information you hold.”

8. From an earlier email from the complainant to HMT of 4 May 2022, it is clear that this FOIA request exchange was based on the terms of the agreement between HMT and Hanbury Strategy set out in Contract CCZZ20A32, which stated the following (with the complainant’s emphasis in bold):

“- The Customer (the Treasury) requires the Supplier (Hanbury) to hold two focus groups per week [to] be held with participants from across the UK....**The Customer will provide the Supplier with direction on the question schedules for the focus groups**; and - The Supplier will provide once-weekly web-based quantitative polling...**The Customer will set the questions**, which will be formed of 20-30 single choice, multiple choice and grid questions, to be agreed on a weekly basis between the Customer and the Supplier”.

9. On 9 September 2022, HMT responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so: - section 35(1)(a); - section 43(2); and - section 40(2). The complainant requested an internal review on 2 November 2022.
10. HMT sent them the outcome of its internal review on 21 March 2023. It upheld its original position. Unfortunately, the complainant had to chase HMT for a response to their request for internal review.

Scope of the case

11. The complainant contacted the Commissioner on 12 July 2023 to complain about the way their request for information had been handled.
12. The Commissioner considers that the scope of his investigation is to decide whether HMT is entitled to rely on sections 35, 43 and 40 as its basis for refusing the information that the complainant requested on 28 June 2022.

Reasons for decision

Section 35 – Formulation or development of government policy

13. Section 35(1)(a) states: “(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to:

(a) the formulation or development of government policy.”
14. The Commissioner considers that the term ‘relates to’ in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.
15. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. His guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process¹.
16. Regarding the information to which section 35(1)(a) has been applied, HMT explained:

“Rather than there being a single policy to which the request relates, there are numerous policies covered in the report². Ideas and concepts that were tested in the polling are fed into the policy making process.”

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

² The withheld information does not include a report. The Commissioner assumes this is a typo.

While some of the questions may not directly relate to one single policy, the insights are used in the formulation and development of a number of different policy areas. [It then referred to specifics in the withheld information] A number of these policies remain live and highly sensitive. Even if policies which were tested have not yet gone on to become policy at the time of drafting, they remain under review and as part of the toolbox which the Government continues to use to respond to the current economic circumstances”.

17. The Commissioner has considered HMT’s argument and, having seen the withheld information, agrees that the information relates to both live and concluded policy matters. In reaching this conclusion he is mindful that HMT’s use of the expression “toolbox” is somewhat reminiscent of the concept of the “seamless web” of policy making which has been dismissed by the Tribunal in a number of judgments.
18. The Commissioner’s guidance (see Note 1) states:

“The Commissioner does not accept that there is inevitably a continuous process or ‘seamless web’ of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was the approach taken by the Information Tribunal”. The guidance then lists and comments on a number of cases considered by the First-tier Tribunal (Information Rights).
19. The Commissioner has identified particular extracts of the withheld information which refer to (or relate to) potential polling questions about the government’s handling of the Covid-19 pandemic. This recorded information relates or refers to policies which were, at the time of the request, no longer in effect.³ For ease of future reference, these extracts are referred to as the “Covid-19 extracts” in the remainder of this Notice. The Covid-19 extracts are set out in full in a Confidential Annex to this Notice.
20. Other parts of the emails, while of a similar nature, do not fall into the above category.
21. Attached to the emails containing Covid-19 extracts are other documents which are clearly Hanbury Strategy work product. For ease of future reference, these will be referred to as the “Attachments”. Any information which is not part of the Covid-19 extracts and is not in the

³ The Commissioner has listed examples of these in the Confidential Annex.

Attachments will be referred to in the rest of this Notice as the "Remainder".

22. The complainant explicitly excluded information sent from Hanbury Strategy to HMT. As such, the Commissioner has concluded that the Attachments fall outside the scope of the request.
23. While they have been attached to the requested emails and some of the emails' content relates to or refers to them, they can clearly be excluded from further consideration because the complainant themselves deliberately excluded them. The Commissioner also accepts that, without the Attachments, some meaning in the emails is lost but not to the extent that it renders the emails incomprehensible as stand-alone pieces of information.
24. In light of the above, he has concluded that the information to which HMT applied section 35(1)(a) does relate to both the formulation and development of government policy. As such, it is exempt from disclosure under section 35(1)(a) of the FOIA.

Public interest test

25. Section 35(1)(a) is subject to a balance of public interest test. This means that the information in question can only be withheld from disclosure if the public interest in maintaining this exemption outweighs the public interest in disclosure.
26. The Commissioner notes that the complainant has stressed that at no stage in the above request did they ask to receive any copies of emails or other correspondence from Hanbury to HMT, any reports from Hanbury on the outcomes of their focus groups and polling, or even the final question schedules used for their focus groups and opinion polls. They emphasised to the Commissioner that their request related entirely to the input of HMT officials and advisers into the focus groups and polls conducted in the weeks in question, and had nothing to do with Hanbury's work product.
27. HMT argued that some of the information which falls within the scope of the request inevitably includes Hanbury Strategy work product. As noted in paragraph 16 above HMT also argued that the withheld information relates to a range of policies and not just one.

Public interest arguments in favour of maintaining the exemption

28. HMT repeatedly referred to requested reports in its arguments in favour of maintaining the exemption. The Commissioner is uncertain which information HMT is referring to here. If it is referring to the Attachments, the Commissioner is satisfied, as explained above, that they fall outside the scope of the complainant's request.

29. It also argued that testing ideas was an integral part of the policy making process and "help to shape how the department makes good policy".
30. It said that there was a strong public interest in "protecting against the encroachment on the ability of Ministers and Government officials to formulate and develop policy options freely and frankly". The Commissioner would characterise this as a "safe space". HMT said that disclosure of the requested information would cause "serious damage to the integrity and validity of the process" and that this would, in turn, reduce the quality of policy decision-making within the department.
31. It went on to describe all the policy areas that were covered in the withheld information some of which related to Covid-19 pandemic support measures but most of which did not.
32. It also described the danger of disclosing incomplete information which "could lead to an escalation of misinformation and misunderstanding rather than the full transparency intended".
33. It also gave an example of the danger of releasing information about a live policy matter which had yet to be fully formulated but which was included in a polling question. It reiterated the benefit of polling as part of the policy formulation process and described the risk of distorting this process by disclosing polling information. It was concerned that this would result in reducing the quality of policy decision making.

Public interest arguments in favour of disclosure

34. HMT acknowledged a general public interest in transparency and furthering public understanding of the work of HMT. It said "we also recognise that there is a public interest in furthering public understanding of matters such as the policy considerations in responding to the COVID-19 pandemic".
35. The complainant argued:

"Disclosure of that information would also help public understanding of whether HMT ministers were asking the right questions at a crucial time to determine the best actions to take on the country's behalf during the early stages of the Covid pandemic, thereby promoting public confidence in HMT's policy-making process leading up to decisions such as the announcement and implementation of the Eat Out To Help Out scheme in July and August 2020."
36. The complainant also disputed HMT's assertion that "weekly focus group and online polling activity carried out from June 2020 onwards has been a regular and routine part of its policy-making process, which would be disrupted by the disclosure of the information requested in my case".

37. The complainant cited newspaper articles and responses to newspaper articles covering a period after the one described which appeared to indicate that the impact of language used was assessed in polling.⁴ The complainant also questioned whether polling was used for party political rather than policy making purposes. They said:

“In particular, if it is the case that Hanbury’s focus groups and polls were used to test out the language that would be used by the Chancellor when announcing policies in response to the pandemic, and the broader messaging about his handling of the economy at that time, then I do not believe it can credibly be argued that the questions and directions supplied by HMT for those purposes during the timeframe of my request must continue to be withheld to protect the ongoing formulation of policy.”

38. They also hoped they had provided “sufficient evidence to establish that the information I have requested specifically relates to the questions HMT sought to ask the public about its response to the pandemic, and that there is a strong public interest in the disclosure of that information”. They acknowledged that there was a balance to be struck to ensure that disclosure “would not constrain the freedom of ministers to formulate policy options”.

39. They queried whether the information would relate to live policy making and commented:

“[I]t must first be noted that – between the initiation of HMT’s contract with Hanbury in June 2020 and the submission of my FOI request in August 2022 – there were no fewer than 12 statements to Parliament by the Chancellor (and in one case the Prime Minister) setting out fiscal and economic measures to respond to the pandemic and the subsequent cost of living crisis, all but the first of which took place after the period covered by my FOI request: – 08/07/20: Rishi Sunak statement: ‘A Plan for Jobs’; – 24/09/20: Rishi Sunak statement: ‘Winter Economy Plan’; – 22/10/20: Rishi Sunak statement: ‘A Plan for Jobs (update)’; – 09/11/20: Rishi Sunak statement: ‘Future of Financial Services’; – 25/11/20: Rishi Sunak statement: 2021/22 Spending Review; – 11/01/21: Rishi Sunak statement: ‘Economic Update’; – 03/03/21: Rishi

⁴ <https://www.independent.co.uk/news/uk/politics/rishi-sunak-focus-groups-whistleblower-b2113049.html>
<https://questions-statements.parliament.uk/written-questions?SearchTerm=33730&DateFrom=11%2F07%2F2022&DateTo=07%2F10%2F2024&AnsweredFrom=&AnsweredTo=&House=Commons&Answered=Any&Expanded=True>
<https://questions-statements.parliament.uk/written-questions?SearchTerm=33731&DateFrom=11%2F07%2F2022&DateTo=07%2F10%2F2024&AnsweredFrom=&AnsweredTo=&House=Commons&Answered=Any&Expanded=True>

Sunak statement: 'Budget 2021'; – 07/09/21: Boris Johnson statement: 'Health & Social Care Levy'; – 27/10/21: Rishi Sunak statement: 'Autumn Budget and Spending Review'; – 03/02/22: Rishi Sunak statement: 'Energy Price Cap and support for families'; – 23/03/22: Rishi Sunak statement: 'Spring Economic Statement'; and – 26/05/22: Rishi Sunak statement: 'Cost of Living Support'.

40. The complainant said:

"In order for HMT's central argument to hold water, we would have to believe that – despite the volume of relevant decisions and announcements made in this area since June 2020 – ministers have not yet enjoyed sufficient amounts of safe space within which to formulate their policies in the areas covered by my request, and that disclosure of the questions and directions supplied to Hanbury over a four week period almost three years ago would now seriously inhibit their ability to do so".

41. They argued that "if it was revealed that HMT was currently relying on data from focus groups and opinion polls carried out in July 2020 to inform its understanding of "consumer confidence, attitudes to public spending and the prioritisation of public funding", and was taking its economic decisions accordingly, the general public would rightly consider that to be a misguided approach."

Balance of public interest

42. As noted above, the Commissioner, having excluded the Attachments from further consideration, has divided the withheld information into two: the Covid-19 extracts and the Remainder.

43. While recognising the public interest in protecting the safe space in which policy is formulated and developed, including where polling is used, the Commissioner considers that the information in the Covid-19 extracts should be considered separately. There is an extremely strong public interest in knowing more about how the government was using polling to inform policy development around its handling of the Covid-19 pandemic. For obvious reasons, it was a fast moving area of policy development and there was a clear public interest in protecting the safe space in which that policy development occurred at the time.

44. That time has now passed. In the Confidential Annex to this Notice, the Commissioner has set out links to online information which confirms that specific policies or official schemes identified in the Covid-19 extracts are now no longer in operation. As they are no longer live policies, the public interest in protecting the safe space in which they were developed is much weaker.

45. The Covid-19 pandemic was a unique situation of international emergency. There is a strong public interest in understanding HMT's contribution to the UK government's response. The Commissioner recognises that the Covid-19 extracts are necessarily not complete – the Attachments are not within the scope of the request because they are Hanbury Strategy work product. However, the Commissioner does not consider that the Covid-19 extracts lose all meaning without that additional context of the Attachments.
46. The requester sought information sent "to Hanbury Strategy to inform the focus groups and opinion polling". As the complainant pointed out, the contracts stated that "The Customer will provide the Supplier with direction on the question schedules for the focus groups". The Commissioner recognises that, given the unique circumstances of the Covid-19 pandemic (which is now over), there is a clear public interest in knowing more about the directions given to Hanbury Strategy regarding the questions it should put to the focus groups about this topic. Disclosure would serve this public interest.
47. In light of the above, the Commissioner has concluded that HMT cannot rely on section 35(1)(a) with respect to the Covid-19 extracts. While that information falls within the class of information described in the exemption at section 35(1)(a), the public interest in disclosure outweighs the public interest in maintaining that exemption.
48. With respect to the Remainder, the Commissioner is less convinced as to the weight of public interest in disclosure. The Commissioner notes the complainant's comments about recent policy announcements and also notes the complainant's suspicions as to the use of polling for party political rather than policy formulation and development purposes.
49. The Commissioner recognises that disclosing the Remainder would assist the public in learning more about the operation of these contracts where polling is used for policy formation and development. It would also inform the public interest in knowing whether the polling was for party political purposes rather than policy making as the complainant contends.
50. However, he is mindful of the fact that, even if some of the policies referred to in the Remainder have been implemented, they were recently formulated in a safe space for policy development. While, as stated above, the public interest in protecting a safe space lessens when the policy has been implemented, it does not disappear altogether.
51. In addition, unlike with the Covid-19 extracts, there are not the same weighty public interest factors for disclosure of such recently created information. The Commissioner also accepts that the Remainder includes live policy which means that there is an even greater public interest in

protecting the safe space in which it is either formulated or developed. He would also note that it is far more difficult to identify within the Remainder that information which relates to live policy and that which does not.

52. While recognising the public interest in informing the complainant's suspicions about the use to which polling information is made, the Commissioner does not, in the circumstances of this case, consider that factor carries sufficient weight either.
53. In light of the above, the Commissioner has concluded the public interest in maintaining the exemption with respect to the Remainder outweighs the public interest in disclosure. In reaching this view, he has given particular regard to the age of the information and the fact that much of information relates to live policy.

Section 43 – Prejudice to commercial interests

54. As outlined above, HMT has applied section 43 to the Attachments. The Commissioner is satisfied that these fall outside the scope of the request because the complainant specifically excluded information from Hanbury Strategy. While the Commissioner recognises that the Attachments were attached to the Covid-19 extracts, he does not consider that the meaning of the Covid-19 extracts is lost by excluding the attachments.
55. Given that the Commissioner does not consider the Attachments fall within the scope of the request, he has not considered the application of section 43.

Section 40(2) – Personal data

56. The personal data in question is names of junior officials or email addresses where the junior official to whom it is connected can easily be identified. It is an established position that unless there are unusual circumstances, any personal data relating to an individual below the rank of Senior Civil Servant can be withheld under section 40(2). The Commissioner is satisfied that there are no relevant circumstances applicable in this case. As such, he is satisfied that this personal data has been properly withheld under section 40(2).

Other matters

57. The Commissioner is concerned about handling errors on HMT's part during the conduct of its internal review. The complainant said:

"On Page 4 of their Internal Review response, HMT describe the 'time in scope' of my request as being the period January 2021 to January 2022.

This is entirely wrong. My original request to HMT covered the focus groups and polling carried out in the period June to December 2020. Asked to narrow that request down, I first proposed confining it to the first Hanbury contract (CCZZ20A32) covering the period 10th June-10th September 2020; and asked to narrow it down still further, I selected four weeks within that period, which was the request that HMT agreed to process. At no stage did I ever request information covering the period January 2021 to January 2022; ... At the bottom of Page 4, HMT go on to say: 'The information discussed in email correspondence explored these policy questions, all of which were ongoing at the time when the request was made in March 2021 and at the time of the internal review'. My original request was made on 4th May 2022 and my final request accepted by HMT for processing was made on 9th August 2022, so whatever request HMT were referring to in their Internal Review response was not mine."

58. The Commissioner acknowledges the complainant's concerns and would recommend that HMT revisits the correspondence to consider any lessons that may be learned from this apparent mix-up.
59. There is no statutory timescale by which internal reviews should be completed. The Commissioner recommends that in most cases, an internal review should take no longer than 20 working days. In exceptional circumstances, the Commissioner accepts that internal reviews may take up to 40 working days. HMT exceeded both in this case.

Right of appeal

60. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
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